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No. 07-1020

FILED

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CHRISTOPHER A. GRAHAM,

Petitioner,

v.

AT&T MOBILITY, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition regarding the Seventh Circuit's Opinion affirming the District Court's award of costs?

II. Whether Petitioner has presented compelling reasons to grant the Petition regarding the Seventh Circuit's Opinion affirming the District Court's dismissal of his race discrimination claims?

III. Whether Petitioner has presented compelling reasons to grant the Petition regarding the Seventh Circuit's Opinion affirming the District Court's grant of summary judgment on his remaining race and retaliation claims?

IV. Whether Petitioner has presented compelling reasons to grant the Petition regarding the Seventh Circuit's Opinion affirming the District Court's denial of his Rule 60 (b) (6) motion to reconsider?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent AT&T Mobility, LLC, formerly Cingular Wireless, LLC, is a limited liability corporation owned by:

SBC Long Distance, LLC - Delaware limited liability company. Principal Place of Business: 5850 West Las Positas Blvd., Pleasanton, CA 94588. Sole Member: SBC Telecom, Inc., a Delaware corporation. Principal Place of Business: 175 East Houston Street, San Antonio, TX.

SBC Alloy Holdings, Inc. - Delaware corporation. Principal Place of Business: 175 East Houston Street, San Antonio, TX.

AT&T Mobility Corporation – Delaware Corporation. Principal Place of Business: 5565 Glenridge Connector, Atlanta, GA 30342.

BLS Cingular Holdings, LLC - Georgia limited liability company. Principal Place of Business: 1155 Peachtree Street, N.E., Atlanta, GA 30367. Members:

(a) AB Cellular Holding, LLC, a Delaware limited liability company. Principal Place of Business: 1155 Peachtree Street, N.E., Atlanta, GA 30367. Members: (1) BellSouth Mobile Data, Inc., a Georgia corporation. Principal Place of Business: 1155 Peachtree Street, N.E., Atlanta, GA

30367. (2) RAM Broadcasting Corporation, a New York corporation. Principal Place of Business: 1155 Peachtree Street, N.E., Atlanta, GA 30367.

(b) Wireless Telecommunications Investment Company, LLC, a Delaware limited liability company. Principal Place of Business: 1155 Peachtree Street, N.E., Atlanta, GA 30367. Member: BellSouth Mobile Data, Inc., a Georgia corporation.

(c) BellSouth Mobile Data, Inc., a Georgia corporation. Principal Place of Business: 1155 Peachtree Street, N.E., Atlanta, GA 30367.

All of the companies listed above are subsidiaries of AT&T, Inc., and none are traded publicly. AT&T, Inc. is a publicly traded company, and there is no one person or group that owns 10% or more of the stock of AT&T, Inc. No third party has a financial interest in this case.

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COUNTER STATEMENT OF THE CASE

A. Factual Background

1. Petitioner's Employment with Respondent

Petitioner Christopher Graham ("Petitioner") is employed as a wireless technician with AT&T Mobility, LLC ("AT&T Mobility") in its Field Engineering Department.[1] App. 67, ¶ 2; App. 159.[2] He has been employed with AT&T Mobility or one of its predecessor companies since 1993. App. 67, ¶ 1; App. 159. The Field Engineering Department is responsible for maintaining the Chicago, Illinois cellular market for AT&T Mobility. App. 67-8; ¶ 3; App. 159. At all times relevant to this lawsuit, Petitioner's supervisors were John Coffey (November 2002 to March 2005) and David Lindon (January 2005 to present). App. 68, ¶ 6; App. 69, ¶ 9. From the beginning of Petitioner's employment through the relevant time period covered by this lawsuit, Petitioner was never denied a promotion, suspended, disciplined, or even reprimanded in any fashion. App. 68, ¶ 4; App. 95, ¶ 118; App. 165.

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[1] AT&T Mobility LLC was formerly Cingular Wireless, LLC, the named defendant in the proceedings in the lower courts.

[2] Citations to "Pet." Refer to the Petition for a Writ of Certiorari filed herein. Citations to "Pet. App." refer to the Appendix filed with the Petition. Citations to "App." refer to AT&T Mobility's appendix filed in the Seventh Circuit Court of Appeals. Citations to "R." refer to the Record in the Seventh Circuit Court of Appeals.

2. AT&T Mobility's Equal Employment Opportunity Policies

AT&T Mobility has at all relevant times maintained a comprehensive equal employment policy which prohibits discrimination, retaliation, and harassment based on race, color, gender, age, national origin, religion, pregnancy, physical or mental disability, and any other protected class. App. 70, ¶ 14; App. 173. This policy is contained within the organization's Code of Conduct, which is distributed to all employees. *Id.* The policy explains how employees may make complaints of discrimination, harassment, or retaliation, and details to whom such complaints should be made. *Id.* AT&T Mobility also has an Ethics Hotline available to all employees to report complaints about discrimination, which are then investigated and resolved. App. 70, ¶ 17; App. 173. Petitioner was aware of these resources, and had made several complaints to human resources which were investigated. App. 76-7, ¶¶ 36-7; App. 80-1, ¶¶ 54-7; App. 82, ¶¶ 63-4; App. 85-6, ¶¶ 79, 82; App. 173-74.

3. Workplace Incidents Related to Petitioner's Lawsuit

Petitioner based his lawsuit on several discrete occurrences between 2003 and 2005. According to Petitioner, on March 17, 2003, in reference to an incident of vandalism, James Gurga, an Operations Manager, purportedly stated to Petitioner's co-worker Dan Delaney, "they might suspect you because you have a tan." Gurga does not directly supervise Petitioner. App. 82-3, ¶ 67. Petitioner learned of this alleged comment from co-worker Carl Blackmon, who was

present during the conversation. *Id.* Gurga did not make the alleged comment to Petitioner. Petitioner was not present when the comment was allegedly made and Gurga did not mention Petitioner when he allegedly made the comment. App. 83, ¶ 69, App. 202. Petitioner never complained to human resources about this comment. App. 83, ¶ 70.

On November 18, 2003, Petitioner's co-worker Michael Morrissey, in his capacity as a union steward, sent an e-mail to his co-workers who were union members which stated, among other things, that the union frowns upon employees "ratting out" other employees. App. 84, ¶ 71. Morrissey's e-mail was communicating information he had recently learned at a union steward training meeting and the comment in the e-mail had nothing to do with Petitioner. App. 84, ¶ 71, 73. When he sent the e-mail, Morrissey was unaware Petitioner had filed an EEOC charge or that he had complained about discrimination. App. 84, ¶ 74. Petitioner did not complain to human resources about the e-mail. App. 84, ¶ 72.

In early 2004, Petitioner received his 2003 performance evaluation. App. 75, ¶ 33. Petitioner received satisfactory ratings and had no objection to the numerical ratings in the reviews, just the comments. *Id.* Petitioner met with Coffey, his supervisory at that time, and Timothy Kaufenberg, the Director of Network Operations for Illinois, to discuss the evaluation. App. 75-6, ¶ 34. Petitioner disagreed with some of the statements in the evaluation. App. 76, ¶ 35. Specifically, Petitioner objected to the following statement: "Continued efforts toward staying abreast of changing

technology and retention of job knowledge could improve Chris's effectiveness when working in ambiguous situations." *Id.* He also objected to the statement that "Chris needs to consider feedback as an opportunity to learn from others' experiences and respond appropriately with internal groups. He needs to foster a better working relationship with his peers to identify opportunities for professional growth and development." *Id.* This type of feedback in a performance evaluation was consistent with that given to others, and white employees had been advised in their performance reviews to communicate better and to keep their managers apprised of their activities. App. 77, ¶ 39. The overall ratings or comments received by Field Engineering Technicians on their performance appraisals do not affect their salary, raises, bonuses or job assignments. App. 77, ¶ 41.

Petitioner complained to Senior Human Resources Manager Corinne Bolanowski about his evaluation and requested a meeting with her and an investigation of all of the statements in the review. App. 76, ¶ 36. Bolanowski investigated the complaint, including asking Coffey to substantiate the comments in the evaluation. App. 76, ¶ 37. Coffey did so, and Bolanowski determined the appraisal was in order and she communicated this to Petitioner. *Id.* Bolanowski offered to meet with Petitioner several times. App. 76-7, ¶ 37. Petitioner stated he would not attend the meeting without union representation. App. 87, ¶ 85. Bolanowski responded she could not grant that request because this was not a disciplinary meeting in which union representation would be allowed. *Id.* Petitioner then refused to meet with her. *Id.*

In the spring of 2004, following his receipt of his 2003 performance evaluation, Petitioner started sending e-mails to his co-workers informing them of his daily work activities. App. 78, ¶ 43. Petitioner admitted he was not required to do so, but rather chose to send the e-mails on his own initiative. App. 78, ¶ 45. Lindon did not require Petitioner to send out daily e-mails about his work schedule. App. 79, ¶ 49. Petitioner made no complaint to human resources that he had allegedly been required to send such e-mails. App. 78, ¶ 47.

In or about March 2004, Morrissey placed a small "built by Irish crew" label on a temporary movable cell tower he had personally built with another employee. App. 85, ¶ 77. Morrissey did not know the movable cell tower would be temporarily assigned to one of Petitioner's sites. *Id.* Petitioner complained to Bolanowski about the "built by Irish crew" label. App. 85-6, ¶ 79; App. 173-74. She investigated the allegations and spoke to Kaufenberg. App. 85-6, ¶ 79. Kaufenberg then told Morrissey to remove the label, which was immediately done. *Id.* Bolanowski directed that Morrissey be coached regarding the incident. Morrissey was reprimanded by Kaufenberg regarding his actions, and coached not to place any such labels on any cell sites in the future. *Id.* Petitioner never saw any label like it again. App. 86, ¶ 82.

On October 13, 2004, Dan Delaney, one of Petitioner's co-workers, sent Petitioner an e-mail requesting Petitioner consolidate his multiple e-mails sent to the Department throughout the day into one e-mail per day. App. 81, ¶ 60, App. 170-71. Petitioner responded negatively to Delaney's e-mail, and Delaney

sent Petitioner a reply apologizing for his initial e-mail. App. 81, ¶ 61. Even though Delaney apologized for sending the e-mail, Petitioner was not satisfied because Delaney did not copy the entire department on the apology. *Id.* Petitioner complained to Bolanowski regarding Delaney's e-mail. App. 82, ¶ 63. After receiving the complaint, Bolanowski asked Petitioner whether the issue was resolved based on Delaney's apology. App. 82, ¶ 64. She determined there was nothing discriminatory or inappropriate about Delaney's request. *Id.*

In July 2005, Petitioner requested a laptop computer mount for his van. App. 89, ¶ 94; App. 170-71. Such equipment was not available from AT&T Mobility's regular supplier, which resulted in a delay in obtaining the mount. App. 93-4, ¶¶ 109-10. Petitioner ultimately received the mount, and is the only technician with such equipment. App. 94 ¶ 115. In October 2005, Petitioner told Lindon his cell phone was not working, and Lindon said he would get it repaired. App. 92, ¶ 106. Petitioner believes it took too long for Lindon to get the phone repaired. App. 92, ¶ 107.

During the period from September to November 2005, all of the approximately 38 technicians in the Field Engineering Department were required to attend Ericsson "UMTS" training. App. 90, ¶ 97. Pursuant to company policy and the collective bargaining agreement, when all employees in a department are being trained, such training may be scheduled without regard to seniority. App. 92, ¶ 102. When training is offered to only a subset of employees, it must be scheduled in order of seniority. *Id.* The training at issue was required of all

employees and therefore did not need to be scheduled based on seniority. App. 90-92, ¶¶ 97-98, 100, 102. As a result, AT&T Mobility was not obligated to schedule Petitioner in the first training class. *Id.* In fact, more senior white employees attended the training after Petitioner. App. 90, ¶ 98. Because the UMTS system was not even launched until December 2005, there was no advantage to being among the earliest technicians to attend the UMTS training. App. 90-91, ¶ 98. Petitioner did not complain to human resources regarding the scheduling of his training. App. 92, ¶ 104.

On October 25, 2005, Larry Barrett, one of Petitioner's co-workers, sent an e-mail to Petitioner asking him why he sends out separate e-mails on the status of each of his sites to the entire department rather than in one communication. App. 79, ¶ 51. Petitioner complained to Senior Human Resources Manager Tracy Ryan about Barrett's e-mail. App. 80, ¶ 54. Ryan investigated the complaint. App. 80, ¶ 55. She spoke to Barrett, who stated he had e-mailed Petitioner and asked him to attempt to consolidate his e-mails and that he also sent an e-mail to the entire team requesting they do the same. *Id.* As part of the investigation, Ryan also spoke to Petitioner and Lindon, who stated he did not require Petitioner to send e-mails to everyone on the team. App. 80, ¶ 56. Ryan concluded there was no evidence Barrett's e-mail was inappropriate or that it was racially discriminatory or retaliatory. App. 81, ¶ 57.

B. The Proceedings Below

1. The District Court

Petitioner has a long history of filing meritless discrimination charges and lawsuits against his employer alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. App. 23-30, 33-47. On April 1, 2002, Petitioner filed his first Charge with the Equal Employment Opportunity Commission ("EEOC") against AT&T Mobility (the "2002 charge") alleging he was discriminated against based on his race with regard to promotions, training, and bonuses from March 15, 1993 through March 29, 2002. App. 71, ¶ 19. Petitioner did not file a lawsuit based on the allegations of race discrimination contained in the 2002 charge. App. 71, ¶ 20.

On May 29, 2003, Petitioner filed a second EEOC charge (the "2003 charge") claiming race discrimination and retaliation, including allegations he was denied overtime and received a negative performance review. App. 71, ¶ 21. Petitioner filed suit (*Graham, et al. v. Cingular Wireless et al.*, Case No. 04 C 540), alleging he was retaliated and discriminated against based on his race in regard to promotions, assignments, and overtime pay, and was subjected to a hostile work environment due to racial graffiti. App. 71, ¶¶ 22-3. The District Court dismissed Petitioner's complaint in March 2004, and the Seventh Circuit Court of Appeals dismissed Petitioner's untimely appeal for lack of jurisdiction (No. 05-1370). App. 71, ¶ 24.

In November 2004, Petitioner filed his third EEOC charge (the "2004 charge") alleging he was retaliated against for filing his 2003 charge by receiving a "derogatory" performance evaluation; being told by a co-worker that a manager made an allegedly racist comment; being directed to "copy all of [his] e-mails and send them to [his] direct manager and work group;" having a "built by Irish crew" sign placed in an area in which he worked; being denied his request to have a union representative present during a meeting concerning his evaluation; and having "false and defamatory" statements made about him to his personal injury attorney. App. 72, ¶ 25; App. 160-61.

In February 2005, Petitioner filed the underlying lawsuit in this action alleging AT&T Mobility violated Title VII through a pattern and practice of discrimination and by discriminating and retaliating against him for his first lawsuit. App. 72, ¶ 25; App. 160-61. On April 5, 2005, AT&T Mobility moved to dismiss Petitioner's retaliation claim in part, and his race discrimination and "pattern and practice" claims in their entirety. R. 7, 9. District Judge Elaine E. Bucklo granted AT&T Mobility's Motion to Dismiss on October 21, 2005, ruling Petitioner's 2004 charge stated only that he had been "discriminated against because of retaliation." App. 31-32. The Court also noted that only the "retaliation" box was checked on the charge form. *Id.* Further, the Court determined there was "no suggestion in the EEOC charge Petitioner felt he had been discriminated against because of his race" and dismissed the discrimination claim. App. 32. The Court also struck certain allegations of the retaliation claim not raised in the 2004 Charge as outside the scope of the Charge and

dismissed the "pattern and practice" claim because the Charge's allegations pertained to Petitioner alone. *Id.*

On November 1, 2005, Petitioner filed his fourth EEOC charge (the "2005 charge") in which he realleged the dismissed discrimination allegations as well as additional acts of alleged discrimination and retaliation by AT&T Mobility in 2004 and 2005. App. 73-4, ¶¶ 27-8; App. 161. Shortly thereafter, Petitioner then filed an amended complaint in this case alleging retaliation and race discrimination claims based on acts alleged in his 2005 charge. App. 33-47; App. 74, ¶ 29; App. 161.

AT&T Mobility moved to dismiss the race discrimination claim in the amended complaint as untimely and to strike other untimely allegations from the amended complaint based on *res judicata*. R. 28, 29. On March 6, 2006, the District Court granted AT&T Mobility's Motion to Dismiss in part. R. 43. It ruled Petitioner could only allege race discrimination based upon acts occurring within 300 days of the filing of his 2005 EEOC Charge, and that he could not rely on a continuing violation theory to pursue earlier discrimination allegations. The District Court also ruled Petitioner's untimely allegations were barred under the doctrine of *res judicata* due to the dismissal of his first lawsuit (*Graham, et al. v. Cingular Wireless, et al.*, Case No. 04 C 540) and his failure to timely file an EEOC charge. *Id.*

Thereafter, AT&T Mobility moved for summary judgment on Petitioner's remaining claims. App. 48-96. Petitioner filed a response which was limited to a response to AT&T Mobility's Local Rule 56(a)(1)

Statement of Undisputed Material Facts. Petitioner did not file a memorandum of law or proffer any evidentiary submissions other than a lengthy affidavit containing numerous exhibits. R. 57, 58. In its Order granting AT&T Mobility's Motion, the District Court ruled it could not consider portions of Petitioner's affidavit that were outside his personal knowledge, reliant on hearsay, speculation, or unsupported opinion. App. 158. The Court also ruled that much of Petitioner's response to AT&T Mobility's Local Rule 56.1(a)(3) Statement did not comply with Local Rule 56.1(b)(3) because it did not contain specific references to affidavits, parts of the record, or other supporting materials. App. 158-59.

With respect to Petitioner's discrimination and retaliation claims, the Court ruled Petitioner was unable to establish a *prima facie* case because he could not show any of the instances of alleged discrimination and retaliation constituted an adverse action and because he did not identify any similarly situated employees who were treated more favorably. App. 165-69. To the extent Petitioner attempted to assert a hostile work environment claim, the District Court found the incidents complained of were race-neutral and not so severe or pervasive as to alter the conditions of his employment. App. 170-71. Finally, the Court ruled that even if the incidents were actionable harassment, AT&T Mobility was not liable because it had promptly investigated Petitioner's complaints and taken action when appropriate. App. 173-74.

On July 11, 2006, Petitioner filed a Rule 60(b)(6) Motion asking the District Court to reopen his case based on this Court's decision in *Burlington Northern*

& Santa Fe Ry. Co. v. White, 548 U.S. 53, 165 L.Ed. 2d 345, 126 S. Ct. 2405 (2006), decided after the District Court granted AT&T Mobility's Summary Judgment Motion. App. 177-99. The District Court denied Petitioner's motion. Applying *Burlington*, the District Court found several of the complained of actions would not have been materially adverse to a reasonable person. App. 202. The Court also found that even if other actions could qualify as materially adverse, Petitioner could not establish a *prima facie* case of retaliation because he had provided no evidence of similarly situated employees being treated more favorably, and that AT&T Mobility had provided legitimate, non-discriminatory reasons for all of the actions and Petitioner had not presented any evidence the reasons were pre-textual. App. 203-04. Accordingly, the Court denied Petitioner's motion.

On July 11, 2006, AT&T Mobility filed its Bill of Costs and memorandum in support, seeking $7,325.60 in court reporter and photocopying costs. R. 74, 75. More than two months later, Petitioner filed an untimely response in opposition to the Bill of Costs in which he did not contest the individual items, but instead argued the Bill of Costs itself was a retaliatory action within the meaning of *Burlington*. App. 14-22. The District Court entered AT&T Mobility's Bill of Costs in the amount requested. App. 13.

2. The Court of Appeals

Petitioner appealed the District Court's rulings to the Seventh Circuit Court of Appeals (Nos. 06-3020 & 06-3734). Petitioner argued the District Court erred in

dismissing his discrimination claims because the failure to check the "race" box on his 2004 EEOC charge form was a clerical error. Pet. App. 37. Petitioner also argued a genuine issue of material fact existed regarding his retaliation and pattern and practice claims and that the District Court misapplied this Court's holding in *Burlington* when it denied Petitioner's motion to reconsider. *Id.* Finally, Petitioner argued the District Court should strike AT&T Mobility's Bill of Costs because it would have a deterrent effect on others wishing to bring discrimination claims. *Id.*

The Seventh Circuit affirmed the District Court's rulings. Pet. App. 33-45. Regarding Petitioner's dismissed discrimination claims, the Seventh Circuit found Petitioner failed to satisfy the prerequisite of alleging a discrimination claim in his 2004 EEOC charge. Pet. App. 37-39. The Seventh Circuit analyzed Petitioner's retaliation claims using both the direct and indirect methods of proof. Applying the direct method, the Seventh Circuit found Petitioner's allegations insufficient. Pet. App. 40-41. Applying the indirect method, the Seventh Circuit found that "[e]ven assuming one or more of [Petitioner's] claims amounts to an adverse employment action," he failed to identify any similarly situated individuals treated more favorably and, therefore, affirmed the District Court's grant of summary judgment. Pet. App. 41.

Because Petitioner failed to properly develop his pattern and practice discrimination arguments in his brief, the Seventh Circuit found he waived those claims and affirmed the District Court's grant of summary judgment of that count. Pet. App. 42. The Seventh

Circuit also found the District Court did not abuse its discretion when it denied Petitioner's Rule 60 (b) (6) motion to reconsider based on this Court's decision in *Burlington*, which approved the approach previously employed by the Seventh Circuit. Pet. App. 42-43. Because the Petitioner failed to demonstrate how the district court improperly applied *Burlington*, the Seventh Circuit affirmed the District Court's denial of Petitioner's motion to reconsider. *Id.* Finally, the Seventh Circuit rejected Petitioner's assertion the Bill of Costs awarded by the District Court would dissuade a reasonable worker from making or supporting a charge of discrimination and, therefore, concluded the District Court did not abuse its discretion in awarding costs. Pet. App. 44.

REASONS FOR DENYING THE PETITION

I. Considerations Governing Review Of Petitions For Writ of Certiorari

This case is not one in which certiorari should be granted because it does not present any compelling reasons as required by Sup. Ct. R. 10 for granting the Petition. The Petition does not demonstrate the decision below conflicts with any decision of this Court or any Court of Appeal, nor that it implicates a federal question unaddressed by this Court. Indeed, the Petition makes no attempt to do so. Rather, the Petition essentially reiterates the arguments rejected by the Seventh Circuit Court of Appeals.

In sum, this is simply an unremarkable case in which the Seventh Circuit Court of Appeals found that the

District Court: 1) properly dismissed Petitioner's untimely and previously-litigated claims; 2) properly awarded summary judgment on Petitioner's remaining claims; and 3) did not abuse its discretion in awarding costs to AT&T. Furthermore, even if the Seventh Circuit Court of Appeals' decision was erroneous, that fact alone is insufficient to support granting the Petition. *See* Sup. Ct. R. 10 ("a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Petitioner has not carried his burden of demonstrating any "compelling reasons" for the Petition to be granted and, thus, the Petition should be denied.

II. The Decisions of the District Court Were Correct and, Therefore, Properly Affirmed By The Seventh Circuit

A. The District Court Did Not Abuse Its Discretion In Entering Costs Pursuant To Rule 54(d).

Rule 54(d)(1) of the Federal Rules of Civil Procedure provides, in relevant part, that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party. " Fed. R. Civ. P. 54(d)(1). In *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 108 S.Ct. 1130, 99 L.Ed. 2d 289 (1988), this Court noted a prevailing party "automatically is entitled to costs" unless the district court finds otherwise. *Id.* at 294. Thus, Rule 54 creates a presumption the district courts will award costs to the prevailing party and confers discretion on the district courts in considering requests

for costs. A district court's discretion is not without limit. *See Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 85 S.Ct. 411, 13 L.Ed. 2d 248 (1964) (noting Rule 54 does not give district judges unrestrained discretion to tax costs and the discretion afforded should be exercised sparingly with respect to expenses not specifically allowed by statute).

The District Court awarded AT&T Mobility costs for deposition transcripts and photocopying, costs which are expressly authorized by statute. *See* 28 U.S.C. § 1920. To overcome the presumption in favor of awarding costs, Petitioner argues the District Court should have denied costs outright because AT&T Mobility allegedly engaged in excessive discovery, "ran up" costs, and that its Bill of Costs was retaliatory. Petitioner's contentions are absolutely baseless.

The record below demonstrates Respondent simply availed itself of its statutory rights in seeking reimbursement of its costs. Petitioner's suggestion that AT&T Mobility's net worth should preclude it from recapturing reasonable costs is unsupported. Likewise, Petitioner's reliance on AT&T Mobility's counsel's March 2, 2006 e-mail as proof of retaliatory motive is misplaced. The e-mail, a response to Petitioner's counsel's request to provide authority for the position that a prevailing defendant is entitled to costs, and which sets forth the law related to recovery of costs, does not evidence a retaliatory motive. App. 22. Likewise, Petitioner's assertion AT&T Mobility purposely engaged in excessive discovery to increase costs is completely unsupported by the record. As the Court below noted, AT&T Mobility acted reasonably by

consistently attempting to narrow the scope of this case in response to Petitioner's repeated attempts to broaden it. As the record reflects, Petitioner asserted claims of discrimination going back ten years, which were either untimely or previously adjudicated. AT&T Mobility avoided discovery into these matters through its motions to dismiss, thereby streamlining the issues in the case. It further limited costs by taking only five depositions, all of persons Petitioner identified as witnesses who could support his substantive claims or damages claims, even though Petitioner identified over 100 witnesses in his Rule 26(a) disclosures. R. 7, 9, 28, 29, 92, Ex. A.[3] Based on these facts, the Seventh Circuit correctly rejected Petitioner's claim that AT&T Mobility needlessly "ran up" its costs to punish him for pursuing his claims. Pet. App. 44. Furthermore, because Petitioner's assertion that AT&T Mobility's Bill of Costs was retaliatory was never raised in an EEOC charge, this claim was not properly before the Courts below and, therefore, can provide no basis for granting the Petition.

Moreover, Petitioner's reliance on this Court's decision in *Burlington* is unavailing. First, the decision in *Burlington* did not exclude Title VII cases from the application of Rule 54 (d). Nothing in *Burlington* could

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[3] Even if the Seventh Circuit Court erred in its statement of the number of depositions AT&T Mobility took – which it did not – the result is the same. Petitioner asserts AT&T Mobility took "eleven plus" depositions in the case, apparently because its counsel questioned witnesses during portions of the depositions Petitioner noticed. Pet. 3. Whether AT&T Mobility took five depositions or twelve, the facts demonstrate AT&T Mobility conducted its defense in a reasonable manner and did not engage in excessive discovery.

reasonably be interpreted as stripping a Title VII defendant of its right to recoup costs as approved by Rule 54 (d). Second, an award of costs is not an "adverse employment action" under *Burlington* because it is not an act of the *employer*. Rather, it is an action of the district court, pursuant to long-established rules of procedure, requiring the losing party to reimburse the prevailing party for certain out-of-pocket expenses incurred in litigation. Moreover, through established procedures, the district court stands as a check to protect against any abuse.

Third, Petitioner's assertion that an award of costs would dissuade a reasonable employee from making or supporting a charge of discrimination is specious. A reasonable employee would not be dissuaded from pursuing a discrimination charge by the possibility that, at some point in the distant future, he might be required to pay costs *if* the case proceeded to litigation and the employer prevailed. The court-ordered payment of costs is entirely unrelated to the pursuit of a charge of discrimination at the EEOC or through the employer's internal complaint procedure. Rather, it follows from a decision to litigate a claim. However, the possibility of having to pay costs to a prevailing employer is unlikely to dissuade a reasonable plaintiff who has been a true victim of discrimination and stands to win substantial economic and non-economic damages, including possible compensatory and punitive damages, costs, and attorneys fees. To the extent having to pay costs would, and should, dissuade someone, such as Petitioner, from bringing meritless claims, then an intended purpose of Rule 54 (d) is served.

In sum, there is no factual or legal basis for Petitioner's argument that AT&T Mobility's Bill of Costs was, in fact, retaliatory. Accordingly, the Petition should be denied.

B. The District Court Properly Dismissed Petitioner's Race Discrimination Claim For Failure to Exhaust His Administrative Remedies.[4]

Petitioner argues the District Court improperly dismissed the race discrimination claim alleged in his original complaint because of a clerical error at the EEOC. Pet. 14-17. This argument entirely mischaracterizes the rulings below. The record reflects the District Court dismissed Petitioner's race discrimination claim because he did not allege race discrimination in his charge. R.9, Ex. A. Even if the Court erred, such error was harmless because the District Court ultimately properly determined Petitioner could not establish a *prima facie* case of retaliation based on the same allegations and applying the same legal standard. Accordingly, the District Court's order should be affirmed.

The District Court's dismissal of Petitioner's discrimination claim was entirely proper. A plaintiff may not bring Title VII discrimination claims not alleged in an EEOC charge. *See Alexander v. Gardner-Denver Co.*,

[4] Petitioner's remaining arguments are certainly not a model of clarity. Accordingly, AT&T Mobility sets forth herein the arguments which most clearly demonstrate the decisions of the Courts below were correct and, therefore, that there is no basis for granting the Petition.

415 U.S. 36, 47 39 L.Ed. 2d 147, 94 S.Ct. 1011 (1974). The record below amply demonstrates Petitioner's 2004 charge focused exclusively on alleged retaliation. R. 9, Ex. A. However, retaliation and discrimination claims are unrelated and an administrative charge of one cannot support a civil suit for the other. The Seventh Circuit has held that all claims of discrimination are cognizable that are like or reasonably related to the allegations of the charge and growing out of such allegations. *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.*, 538 F.2d 164, 167 (7th Cir. 1976) (*en banc*) (quoting *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 162 (5th Cir. 1971)), certiorari denied, 429 U.S. 986, 97 S. Ct. 506, 50 L. Ed. 2d 598 (1976). The standard is a liberal one in order to effectuate the remedial purposes of Title VII. *Id.* at 167-168. Other circuits are in accord with this analysis. *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 928 (11th Cir. 1983); *Satz v. ITT Financial Corp.*, 619 F.2d 738, 741 (8th Cir. 1980); *McBride v. Delta Air Lines, Inc.*, 551 F.2d 113, 115 (6th Cir. 1977), vacated on other grounds, 434 U.S. 916, 54 L. Ed. 2d 273, 98 S. Ct. 387 (1977); *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 398-399 (3d Cir. 1976), certiorari denied, 429 U.S. 1041, 50 L. Ed. 2d 753, 97 S. Ct. 741 (1977); *Joslin Dry Goods Co. v. EEOC*, 483 F.2d 178, 184 (10th Cir. 1973); *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973); *Graniteville Co. (Sibley Division) v. EEOC*, 438 F.2d 32, 41-42 (4th Cir. 1971); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462-467 (5th Cir. 1970). However, the Seventh Circuit correctly recognizes that the gist of a retaliation claim is that the employer lashed out against an employee for exercising a right, not out of animosity

for his race. *See Sitar v. Indiana Dept. of Transp.*, 344 F.3d 720, 726-27 (7th Cir. 2003) (finding plaintiff could not proceed with her discrimination claim based upon an EEOC charge alleging retaliation).

Here, the District Court properly determined Petitioner did not advance a race discrimination claim in his 2004 EEOC charge. First, nowhere in the particulars of his charge did he indicate or even mention he believed he had been discriminated against because of his race or that the alleged retaliatory actions were also racially discriminatory. R. 9, Ex. A. Rather, Petitioner specifically stated, "I believe I have been discriminated against because of *retaliation*, in violation of Title VII of the Civil Rights Act of 1964." (emphasis added). *Id.* Second, Petitioner checked only the retaliation box on his charge. *Id.* Contrary to Petitioner's assertions (Pet. 15-17), Petitioner's claim of racial discrimination cannot be reasonably inferred from the allegations of retaliation in his 2004 EEOC charge and therefore was properly dismissed. Petitioner's assertion AT&T Mobility should have known his 2004 EEOC Charge raised allegations of race discrimination based on its knowledge of his race and prior charges is meritless and its application here would defeat the statutory scheme established by Title VII favoring "an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party [is] permitted to file a lawsuit" (*See Alexander v. Gardner-Denver Co.*, 415 U.S. at 44) while at the same time imposing an unrealistic requirement of clairvoyance on the employer.

Furthermore, even if the District Court did err in dismissing Petitioner's discrimination claim, such error was harmless because the District Court properly determined Petitioner could not establish a *prima facie* case of retaliation based on the same allegations upon which his dismissed race claim was based. The incidents underlying both Petitioner's retaliation and discrimination claims were identical. App. 23-30, 33-47. The District Court ultimately ruled Petitioner failed to establish a *prima facie* case of retaliation based on these incidents in that none of them constituted adverse actions (under both *Burlington* and pre-*Burlington* standards) and Petitioner had not identified any similarly situated employees who were treated more favorably. App. 157-75, 201-05. Moreover, the District Court determined Petitioner proffered no evidence demonstrating Respondent's legitimate non-discriminatory reasons for the actions were pre-textual. App. 204. Accordingly, had Petitioner been allowed to proceed on the discrimination claim in his original complaint, the end result would have been the same.

C. The District Court Properly Dismissed Petitioner's Untimely Race Discrimination Claims.

Under Title VII, to proceed in federal court, a plaintiff must have filed a charge of discrimination with the EEOC describing the basis for the allegations within 300 days of the date of their occurrence. 42 U.S.C. § 2000e-5(e). A plaintiff cannot circumvent the statute of limitations by filing a new EEOC charge mirroring the allegations contained in a retaliation charge filed a year earlier but merely checking the discrimination box

on the charge form. That is what Petitioner attempted to do in this case.

Petitioner's contention that the time barred discrimination claims were part of a continuing violation and, hence, timely is without merit. In *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114-117, 153 L.Ed. 2d 106, 127 S.Ct. 2061 (2002), this Court held the continuing violation doctrine applies only to hostile work environment claims. With respect to discrete acts of alleged discrimination of the type alleged by Petitioner, each act starts a new clock for filing charges, and the clock starts on the date that the act occurred. *Morgan*, 536 U.S. at 113. Any discrete discriminatory acts that fall outside the statute of limitations are time-barred even though they may relate to other discrete acts that fall within the statute of limitations. Similarly, timely filed discrete acts cannot save discrete acts that are related but not timely filed. *Morgan*, 536 U.S. at 112 ("Discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period").

Here, the time-barred discrimination allegations in Petitioner's Amended Complaint all pertained to discrete allegedly discriminatory acts. R. 27, ¶¶ 6, 8, 11-18, 21. Petitioner's assertion of timely discrete acts elsewhere in his complaint does not save these untimely acts. R. 27, ¶¶ 10, 19-20. Furthermore, even if the District Court did err in dismissing Petitioner's untimely allegations of discrimination, such error was harmless because the District Court ultimately properly determined that Petitioner could not establish a *prima facie* case of retaliation based on the same allegations.

The District Court also properly dismissed Petitioner's other untimely allegations because they were or could have been raised in his first lawsuit against Respondent, which was dismissed. R. 43. Accordingly, under the doctrine of *res judicata*, Petitioner was precluded from re-litigating these claims.

D. The District Court Properly Granted Summary Judgment On Petitioner's Remaining Retaliation Allegations.

As a result of the Court's order granting AT&T Mobility's second motion to dismiss, Petitioner's remaining allegations were that AT&T Mobility discriminated and retaliated against him by: requiring him to email his superiors and co-workers about his job progress throughout the day; permitting co-worker Barrett to email him in 2005 to ask him to stop sending numerous emails throughout the day; requiring him to follow "strict instructions" from his supervisors; denying his request to receive earlier technology training due to his seniority as allegedly required by the union's agreement with AT&T Mobility; denying him a laptop mount and a cellular telephone in a timely fashion; and that AT&T Mobility retaliated against him by giving him a "derogatory" performance evaluation in 2004; through co-worker Dan Delaney's 2004 email to Petitioner asking him to stop sending him copies of his emails at the end of the day; through union steward and co-worker Michael Morrissey's 2003 email to Petitioner and all other union members telling them that "ratting people out" could result in dismissal from the union; through James Gurga's racial statement to Petitioner's co-worker that the co-worker might be suspected of

vandalism because he "had a tan;" through Morrissey's placement of a "built by Irish crew" sticker at a cellular site located in Petitioner's work zone; by denying Petitioner's request to have a union representative present when he met with his supervisor regarding his performance review; and through AT&T Mobility's attorney's allegedly "false and defamatory" statement about Petitioner in a settlement letter sent to Petitioner's personal injury attorney. App. 33-47; App. 74-75, ¶¶ 31-32; App. 161-63; R. 43.

Petitioner alleges these incidents present material facts which should have precluded summary judgment on his claims. Pet. 17-20. However, in the proceedings below, Petitioner failed to address several of the grounds on which the District Court granted summary judgment. He made absolutely no argument the District Court erred in: (1) dismissing his race discrimination claim; (2) dismissing his hostile work environment claim; (3) finding he failed to establish similarly situated employees were treated more favorably; or (4) finding AT&T Mobility's legitimate, non-discriminatory reasons for its actions were pre-textual. Petitioner's failure to argue the District Court erred with respect to essential elements of his claims in the proceedings below should, therefore, preclude this Court's granting of the Petition.

1. The District Court properly determined Petitioner could not establish a *prima facie* case of retaliation or discrimination.

Under the indirect method of proof, a plaintiff must first establish a *prima facie* case. *See generally,*

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). If he is able to do so, the burden shifts to the defendant to proffer a legitimate, non-retaliatory or non-discriminatory reason for its actions. *Id.* The burden then shifts back to the plaintiff to establish that proffered legitimate reason was in fact pre-textual. *Id.*

Here, to establish a *prima facie* case of retaliation, Petitioner must show: he engaged in protected activity; was subject to an adverse employment action; was performing his job satisfactorily; and that no similarly situated employee who did not engage in protected activity suffered an adverse employment action. *See Burks v. Wis. Dept. of Transp.*, 464 F.3d 744, 759 (7th Cir. 2006), applying *McDonnell Douglas Corp.* 411 U.S. at 792. Here, Petitioner did not establish the second and fourth elements of the *prima facie* case.

a. Petitioner was not subjected to any materially adverse actions.

A materially adverse action is one that "must be harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington*, 548 U.S. at 53. Materially adverse employment actions do not include trivial harms, petty slights, or minor annoyances. As this Court reasoned in *Burlington*, "it is important to separate significant from trivial harms." 548 U.S. at 53. Title VII does not set forth "a general civility code for the American workplace." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998). Accordingly, an "employee's decision to report discriminatory behavior

cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Burlington*, 548 U.S. at 53.

This Court's holding in *Burlington* is entirely consistent with prior Seventh Circuit law. Indeed, this Court stated the Court agreed with the Seventh Circuit's formulation of the test for actionable retaliation. *Burlington*, 548 U.S. at 53. Here, the undisputed evidence reflects Petitioner suffered no materially adverse actions. None of the acts Petitioner complains of would have dissuaded a reasonable person from complaining of discrimination. Rather, as outlined below, all of the acts upon which Petitioner based his retaliation and race discrimination claims were trivial harms, petty slights, or minor annoyances which do not constitute material adverse actions. App. 202. Indeed, from the beginning of Petitioner's employment through the relevant time period covered by this lawsuit, Petitioner was never suspended, disciplined, or even reprimanded in any fashion. App. 68, ¶ 4; App. 165.

Petitioner's satisfactory performance evaluation was not a materially adverse action. Contrary to Petitioner's assertions, it is undisputed he did not receive a negative performance evaluation, but rather a satisfactory evaluation. App. 75, ¶ 33. His personal dissatisfaction with some of the comments therein does not render the evaluation a materially adverse action. Moreover, AT&T Mobility fully investigated his complaint and determined the evaluation was well-grounded. App. 76-77, ¶¶ 36-37.

Petitioner was not required to send daily e-mails regarding his work activities, and his voluntary decision to do so did not constitute a materially adverse action. Petitioner conceded he was never required to send daily e-mails regarding his work activities to his supervisors or co-workers, but rather took it upon himself to do so. App. 78, ¶ 45. Even if he was required to send daily e-mails, such requirement would not have dissuaded a reasonable person from complaining of discrimination.

Petitioner's co-workers' comments regarding his daily e-mails were not materially adverse actions. Clearly, the e-mails from co-workers Barrett and Delaney regarding Petitioner's e-mail usage are not adverse actions. App. 79-82, ¶¶ 51-66; App. 170-71. First, Barrett and Delaney are not Petitioner's supervisors and could not direct his work or discipline him. App. 80-82, ¶¶ 55, 60, 65; App. 170-71. Second, their requests were nothing more than everyday communications between co-workers regarding business-related activities. Petitioner's subjective upset or embarrassment does not make the requests adverse actions. Moreover, there is no evidence Barrett and Delaney were even aware Petitioner had complained of discrimination when they sent the e-mails, and it is undisputed Barrett has sent similar e-mails to white employees. App. 81, ¶¶ 58-59, 62.

Morrissey's e-mail to all union members regarding "ratting out" other employees was not a materially adverse action.[5] Morrissey's e-mail to the

[5] The District Court correctly determined this allegation was time-barred because it occurred more than 300 days before the filing of the November 2004 EEOC charge. 42 U.S.C. § 2000e-5(e).

entire field engineering department was in no way a materially adverse action. It is undisputed the e-mail was completely unrelated to Petitioner and Morrissey was unaware of Petitioner's EEOC charge and complaint at the time he sent the e-mail. App. 69-70, ¶ 13; App. 84-85, ¶¶ 73-74, 76.

The small "built by Irish crew" label Petitioner's co-worker Morrissey placed on the door of a movable cell tower was not a materially adverse action. Morrissey had no idea the movable cell tower would be placed in one of Petitioner's sites, and was unaware Petitioner had filed any EEOC charges or complained of discrimination. App. 85-87, ¶¶ 77, 81, 83. Furthermore, when Petitioner complained to human resources, Morrissey was immediately required to remove the label, reprimanded, and instructed not to place such labels on company property in the future. App. 85-86, ¶ 79.

Respondent's decision to disallow Petitioner from bringing a union representative to a performance appraisal meeting was not a materially adverse action. Petitioner had no right to union representation at a meeting concerning his petty complaints about his satisfactory performance evaluation. App. 87-88, ¶ 86. Indeed, Respondent's refusal to allow Petitioner to have union representation was based on Company policy, the collective bargaining agreement, and this Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 43 L.Ed. 2d 171, 95 S.Ct. 959 (1975). The policy, CBA, and case law clearly establish that when a meeting with management has nothing to do with disciplinary action, an employee has no right to union representation. App. 87-88, ¶ 86. Petitioner's subjective desire for a union

representative at the meeting does not render AT&T Mobility's entirely lawful refusal of the request a materially adverse action.

The letter from Respondent's workers' compensation attorney was not a materially adverse action. The letter Petitioner complains of was nothing more than a routine settlement communication between attorneys, and thus in no way would have dissuaded a reasonable person from complaining of discrimination. App. 89-90, ¶¶ 94-95; App. 170-71.

The order in which Petitioner attended the UMTS training class was not a materially adverse action. Because AT&T Mobility was not required to train the Field Engineering department employees in order of seniority, because Petitioner received the training, and because there was no advantage to the order in which technicians were trained, the fact Petitioner was not the first person to receive the training was not a materially adverse action.

Respondent provided Petitioner with a laptop mount and wireless phone. Petitioner's petty complaints about purported delays in the processing of his request for a laptop mount and a new wireless phone do not rise to the level of materially adverse actions. App. 92-95, ¶¶ 105-117. Any delays were due to routine problems ordering equipment. App. 93-95, ¶¶ 109-10, 116. Clearly, a delay in receiving work-related products is not a materially adverse action.

A stray comment by a non-decision-maker does not constitute a materially adverse action.

Petitioner's allegation regarding Gurga's "tan" comment is not only untimely because it occurred more than 300 days before the November 2004 EEOC charge, but it is also not actionable as a matter of law. App. 72, ¶ 25; App. 82-83, ¶ 67. The ambiguous and innocuous comment was purportedly made more than three years ago by a non-decision-maker, outside of Petitioner's presence to Petitioner's co-worker. App. 69, ¶ 10; App. 82-83, ¶¶ 67-70. Petitioner never complained about the comment to AT&T Mobility's Human Resources Department. App. 83, ¶ 70. Because the purported comment had absolutely no effect on Petitioner's employment and no relevance to the claims at issue in this case, it should not even have been considered by the Courts below. In any event, such a temporally remote and vague comment, not directed at the complaining employee, would not have dissuaded a reasonable person from complaining of discrimination.

b. The District Court properly determined that Petitioner did not identify any similarly situated employees who were treated more favorably.

In order to establish a *prima facie* case of retaliation or discrimination, Petitioner must also show a similarly situated employee was treated more favorably. The District Court properly found Petitioner presented no evidence that similarly situated employees who had not complained about discrimination or who were not in his protected category were treated more favorably.

For example, with regard to his 2003 evaluation, Petitioner admitted he is simply guessing white employees received more favorable appraisals. App. 77, ¶ 38. He also concedes he has never seen the performance appraisals of his co-workers, was not present at any of their performance appraisal meetings, and cannot identify any employee who received higher ratings. *Id.* Likewise, no employees, regardless of race or protected activity, were permitted union representation at performance review meetings or other non-disciplinary meetings. App. 87-89, ¶¶ 86, 88-90, 92-93. With respect to the distribution of equipment, Petitioner admitted he was not aware of any employees treated differently with regard to equipment, or who received equipment more expeditiously. App. 92-94, ¶¶ 107, 111-12. With respect to the UMTS training, there were several white field technicians with more seniority than Petitioner who received the training after Petitioner. App. 90-91, ¶¶ 98, 101. With respect to the e-mails, it is undisputed Barrett also asked white employees to limit the frequency of their e-mails (App. 81, ¶ 59) and Morrissey sent the "ratting out" e-mail to all union members regardless of their race or whether they had made complaints of discrimination. App. 84-85, ¶¶ 71, 76. Because Petitioner failed to identify any similarly situated employees who were treated more favorably, he failed to establish a *prima facie* case and the District Court properly granted summary judgment and the Petition should be denied.

2. The District Court properly determined that even if Petitioner could make out a *prima facie* case, Respondent's actions were based on legitimate business reasons which were not a pretext for retaliation.[6]

Because the District Court properly found Petitioner could not establish a *prima facie* case of retaliation or discrimination, there was no need to address whether AT&T Mobility's legitimate reasons for its actions was pre-textual. However, even if Petitioner was able to establish a *prima facie* case, AT&T Mobility proffered legitimate business reasons for its actions, and Petitioner cannot establish these reasons are pre-textual. In order to establish pretext, Petitioner must show AT&T Mobility's legitimate reasons were not the actual reasons for the purported adverse employment actions, but rather that his race or his filing of a discrimination charge or complaint was the real reason. *See St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 508, 125 L. Ed. 2d 407, 113 S.Ct. 2742 (1993). Because a Title VII claim requires intentional discrimination, the pretext inquiry necessarily focuses on whether the employer's stated reason was honest, not whether it was accurate. If the employer honestly believed in its reasons, the plaintiff loses even if the reasons are foolish, trivial, or baseless. Courts do not

[6] Because the District Court found Petitioner could not establish a *prima facie* case, it did not reach the other prongs of the burden shifting scheme in its summary judgment decision. App. 175. However, in its decision denying Petitioner's Rule 60(b) motion, the District Court did ultimately find Petitioner had failed to create an issue of fact that Respondent's legitimate non-retaliatory reasons were pre-textual. App. 203-04.

sit as a super-personnel department that reexamines an entity's business decision and reviews the propriety of the decision. Moreover, it is not sufficient for Petitioner to merely establish the reasons were doubtful or mistaken. Pretext does not mean a mistake, but rather a lie, specifically, a phony reason for some action.

Here, the District Court found Petitioner did not present any evidence that Respondent's legitimate reasons for its actions were pre-textual. App. 204. Accordingly, the District Court properly granted summary judgment in favor of Respondent and the Petition should be denied.

E. The District Court Did Not Abuse Its Discretion In Denying Petitioner's Rule 60(b)(6) Motion To Reconsider.

Petitioner argues the Courts below misapplied this Court's holding in *Burlington*, and that a proper application would change the outcome of this case. However, Petitioner offers no argument as to why the complained-of actions were materially adverse. Moreover, the District Court's well-reasoned opinion reflects that it did not abuse its discretion in determining that, even under *Burlington*, Petitioner failed to establish a *prima facie* case of discrimination or retaliation.

As the District Court properly found, no reasonable person in Petitioner's position would view the actions he has complained of as materially adverse. App. 202. For instance, no reasonable person would be deterred from filing an EEOC charge because of a co-worker's

request to send fewer e-mails; purported delay in receiving a laptop mount; or any of the other trivial acts complained of by Petitioner. App. 202. Instead, all of these acts fall squarely in the realm of petty slights and minor annoyances exempted from the category of material adverse actions by this Court. "We speak of *material* adversity because we believe it is important to separate significant from trivial harms. . . . An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Burlington*, 548 U.S. at 53.

Furthermore, as the District Court itself noted, even assuming the remaining acts of "retaliation" Petitioner complained of were "materially adverse," Petitioner still did not establish a *prima facie* case because he did not identify any similarly situated employees who filed charges or complaints or were outside his protected class and were treated more favorably. App. 166-67, 203. Thus, the District Court gave Petitioner the benefit of the doubt with respect to certain aspects of his retaliation claim, i.e. that although certain of the complained of conduct might be materially adverse, it makes no difference here because Petitioner still failed to establish another element of his *prima facie* case. App. 203. Finally, as the District Court properly found, even if Petitioner were able to establish a *prima facie* case, Petitioner failed to establish that any of Respondent's legitimate, non-retaliatory reasons for its actions were pre-textual. App. 203-04. The decisions of the Courts below on all these issues were entirely correct and consistent with this Court's prior rulings. Accordingly, the Petition should be denied.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Therefore, AT&T Mobility respectfully requests that the Petition be denied.

Respectfully submitted,

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